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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-[illegible]

DONALD HENRY GASKINS,

Petitioner,

v.

KENNETH D. MCKELLAR, Warden, South Carolina Department of Corrections, and the Attorney General of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN H. BLUME *
FRANKLIN W. DRAPER
Attorneys at Law

South Carolina Death
Penalty Resource Center
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

ATTORNEYS FOR PETITIONER.

* Counsel of Record

QUESTIONS PRESENTED

1. Did this Court's per curiam decision in Cage v. Louisiana, which disapproved of reasonable doubt instructions materially identical to those given in this case, announce a "new rule" of criminal procedure inapplicable in a habeas corpus proceeding?

2. Whether the definition of "reasonable doubt" employed by the trial court during his charge lessened the state's burden of proof in violation of the Fourteenth Amendment and the due process principles of In re Winship and Cage v. Louisiana?

3. Whether the state's admission of evidence that petitioner had previously been sentenced to death, and information regarding other plea bargains petitioner had entered into, coupled with the trial court's jury instructions, violated the Eighth and Fourteenth Amendments?

4. Whether a constitutionally impermissible burden shifting instruction regarding implied malice was harmless beyond a reasonable doubt?

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Petitioner, Donald Henry Gaskins, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

CITATION TO OPINIONS BELOW

Petitioner was convicted of murder and subsequently sentenced to death on March 26, 1983. The convictions and sentence were affirmed on direct appeal by the South Carolina Supreme Court. State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132, cert. denied, 471 U.S. 1120 (1985).

Petitioner filed an application for post-conviction relief in

the Richland County, South Carolina, Court of Common Pleas on August 6, 1985. J.A.[1] 651. An evidentiary hearing was held on March 21, 1986, and relief was denied on June 6, 1986. J.A. 723-876; 878. The South Carolina Supreme Court denied petitioner's petition for writ of certiorari on January 7, 1987, as did the United States Supreme Court. Gaskins v. South Carolina, 482 U.S. 909 (1987).

A petition for a writ of habeas corpus was filed in the United States District Court for the District of South Carolina on August 11, 1987. The district court referred the case to Magistrate Charles W. Gambrell, who, on January 27, 1989, recommended that the district court dismiss the petition. J.A. 1070. The district court entered summary judgment for the respondents on August 2, 1989. J.A. 1312. Petitioner filed a motion to alter or amend the judgment, pursuant to Fed.R.Civ.P. 59(e), on August 11, 1989. J.A. 1332. The motion was denied on August 28, 1989. J.A. 1350. Petitioner filed a timely notice of appeal and moved for a certificate of probable cause to appeal on September 26, 1989. J.A. 1367. The district court granted a certificate of probable cause to appeal on October 2, 1989. On October 15, 1990, the District Court's order was affirmed by the United States Court of Appeals for the Fourth Circuit. Gaskins v. McKellar, 916 F.2d 941

[1]"J.A." refers to the joint appendix filed in the United States Court of Appeals for the Fourth Circuit in connection with petitioner's appeal.

(4th Cir. 1990).[2] Petitioner's application for rehearing with suggestion for rehearing in banc was denied by the Fourth Circuit on November 16, 1990.[3]

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit denying the petition for rehearing with suggestion for rehearing in banc was entered November 16, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's case involves the Eighth Amendment to the United States Constitution which reads as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves Section One of the Fourteenth Amendment which states in part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was an inmate at Central Correctional Institution (CCI) in Columbia, South Carolina, when he was charged with killing

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[2]A copy of this opinion is attached to this petition for the Court's convenience.

[3]A copy of this order is attached to this petition for the Court's convenience.

a death row inmate, Rudolph Tyner, on September 12, 1982. Tyner had been sentenced to death for the murder of a Mr. and Mrs. Moon during a robbery that occurred on March 18, 1978, and was housed on death row in Cell Block Two (CB-2) in CCI. Petitioner was assigned as the "building man" in CB-2, and in that capacity, performed electrical and other repairs.

Tyner's murder victims were survived by a daughter and a stepson, Tony Cimo. The state's evidence at trial tended to show that Cimo, distraught over his parent's deaths, discussed with an acquaintance the possibility of having Tyner killed by a CCI inmate. Numerous collect telephone calls were subsequently made from CB-2 to Cimo and his acquaintance. The key to the state's case against petitioner was the testimony of James Brown. Brown, a convicted double-murderer incarcerated in CB-2, testified that petitioner had asked him to deliver a speaker device to Tyner, and to tell him to plug it into a wire sticking through the bottom vent of Tyner's cell, which adjoined petitioner's. Brown delivered the package and the message. According to his testimony, a few minutes later he heard an explosion. Afterwards, he claimed that he entered petitioner's cell and saw him pulling a wire into it through a vent.

There was, however, substantial conflicting evidence about petitioner's whereabouts immediately after the explosion, as well as Brown's involvement in the crime. Petitioner presented several witnesses at the guilt-or-innocence phase of his trial who testified that petitioner could not have detonated the explosive

device from where he was immediately after the explosion. Petitioner was found guilty and sentenced to death. Tony Cimo, the person who ordered Tyner's death, subsequently pled guilty to conspiracy to commit murder and was sentenced to five years imprisonment.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

The panel opinion of the Court of Appeals for the Fourth Circuit held that the "substantial-doubt portion of the [reasonable doubt] instruction did not rise to the level of a due process violation," and the "negative effects of the substantial-doubt instruction" were neutralized in the context of the entire instruction. Gaskins v. McKellar, 916 F.2d 941, 952 (4th Cir. 1990). As to the Caldwell v. Mississippi, 472 U.S. 320 (1985), violation, which occurred when the state introduced evidence of petitioner's previously vacated murder conviction and was aggravated by the trial court's repeated use of words to the effect that the jury's binding verdict was only a recommendation; the Court of Appeals concluded that "this evidence and the judge's statement `had no effect on the sentencing decision.'" Gaskins, 916 F.2d at 953 (quoting Caldwell v. Mississippi, 472 U.S. at 341). The Court of Appeals' opinion did note that

> we believe a wiser course would have been for the trial judge to explicitly instruct the jury that the word "recommendation" meant "binding recommendation," under the circumstances, we are satisfied that the jury was properly aware of its sentencing responsibilities.

Gaskins, 916 F.2d at 953. Finally, the Court of Appeals agreed that the malice instruction given at petitioner's trial constituted

an impermissible burden-shifting instruction, but found that any error was harmless beyond a reasonable doubt. Id. at 952.

REASONS THE WRIT SHOULD BE GRANTED

I. Cage v. Louisiana did not create a new rule of criminal procedure, and is therefore fully applicable in collateral proceedings.

Because this case arises on collateral review, and because petitioner relies in part on the authority of a decision of this Court handed down after his conviction became final, the retroactivity of Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328 (1990) (summary reversal), is to be treated as a "threshold issue." Teague v. Lane, 489 U.S. 288, 300 (1989). It is plain, however, that Cage represents nothing more than a straightforward application of the "bedrock, axiomatic and elementary' principle" enunciated in In re Winship, 397 U.S. 358 (1970), that the state must bear the burden of proving any criminal accusation beyond a reasonable doubt. Id. at 363-64 (citation omitted). As Yates v. Aiken, 484 U.S. 211 (1988), makes clear, this Court does not establish a "new rule" for purposes of retroactivity analysis whenever it decides whether a particular jury instruction comports with this well-settled due process requirement. In Yates, this Court held that Francis v. Franklin, 471 U.S. 307 (1985), did not establish a new rule when it applied the constitutional principle of Sandstrom v. Montana, 442 U.S. 510 (1979), to a case involving jury instructions which differed slightly from those declared unconstitutional in Sandstrom. In the same way, Cage v. Louisiana

simply applied the rule of Winship to jury instructions which manifestly failed to convey the reasonable doubt standard. As this Court stated in United States v. Johnson, 457 U.S. 537 (1982),

> [W]hen a decision of this Court merely has applied settled precedents to a new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Id. at 549. Since Cage represents nothing more than the application of In re Winship to a particular set of jury instructions, it can not obviously be said that Cage "altered [Winship] in any material way." United States v. Johnson, 457 U.S. at 549. Put differently, the jury instructions unanimously disapproved in Cage would not have seemed any more consonant with federal due process requirements at any time after Winship and Sandstrom than they do now. Accordingly, this Court's holding in Cage is equally applicable to this case, and requires that petitioner's conviction and sentence of death be reversed.[4]

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[4]Although respondents submitted their brief to the Fourth Circuit Court of Appeals after Teague v. Lane was decided, they did not assert that petitioner was requesting a new nonretroactive rule be established in his case. Therefore, respondents have waived the issue of retroactivity. See Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990) (the state waived the right to argue that an intervening decision of the Supreme Court did not apply retroactively by not advancing the position in the district court).

II. The trial court's instructions regarding reasonable doubt impermissibly lessened the state's burden of proof in violation of the Due Process Clause of the Fourteenth Amendment.

At the conclusion of the guilt-or-innocence phase of petitioner's trial, the trial court defined the concept of "reasonable doubt" for the jury as follows:

> Now, what is a reasonable doubt? First of all, let me tell you what it is not. A reasonable doubt is not some imaginary doubt or some slight doubt or some fanciful doubt that you might have. A reasonable doubt is simply stated a doubt for which you can give a reason. It is a substantial doubt . . . .

J.A. 439 (Tr. 4188, lines 11-16) (emphasis added).

> The two phases, beyond a reasonable doubt and proof to a moral certainty are synonymous and the legal equivalent of each other. These phases connote; however, a degree of proof distinguished from an absolute certainty. The reasonable doubt that the law in its mercy gives the benefit of the accused is not a weak or a slight doubt as I told you earlier, but a serious or strong and well founded doubt as to the truth of a charge.

J.A. 444 (Tr. 4193, lines 5-12) (emphasis added).[5] Petitioner has maintained throughout this litigation that these jury instructions impermissibly relieved the state of its burden of proving his guilt beyond a reasonable doubt imposed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This Court, in a unanimous per curiam opinion, recently held that a state trial court violated the due process principles

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[5]The trial judge relied on this same definition of reasonable doubt at the penalty phase of petitioner's trial. "As you will recall, I told you what beyond a reasonable doubt means." J.A. 611 (Tr. 4408, lines 9-10).

established in In re Winship, 397 U.S. 358 (1970), when it defined reasonable doubt as "such a doubt as would give rise to a grave uncertainty," "an actual substantial doubt," and by comparing reasonable doubt with proof to a "moral certainty." Cage, 111 S.Ct. at 329.[6] This Court rejected the Louisiana Supreme Court's determination that the instructions as a whole accurately conveyed the concept of reasonable doubt, finding it "plain . . . that `substantial' and `grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Id. at 329-30.

The condemned reasonable doubt instruction in Cage is in all material respects identical to the charge given at petitioner's trial.[7] While the trial judge in petitioner's case did not use

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[6]The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970); see also Jackson v. Virginia, 443 U.S. 307, 315-16 (1979). The Supreme Court has consistently recognized that the reasonable doubt standard is a bedrock element of due process and "plays a vital role in the American scheme of criminal procedure." Winship, 397 U.S. at 364. The Court has also emphasized that, "[i]n the administration of justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976).

[7]The instruction in Cage provided in relevant part:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Id. at 329 (emphasis in original).

the term "grave" to modify "doubt," he did describe a reasonable doubt as a "substantial doubt," and not a "slight," "imaginary," or "fanciful" doubt. A reasonable doubt was further described as a "serious," "strong," and "well founded doubt." In addition, the trial judge advised the jury that a reasonable doubt was one for which a juror "can give a reason," and, as in Cage, he stated that a reasonable doubt was a "substantial doubt." The instructions in petitioner's case also additionally contained the language condemned in Cage that a reasonable doubt is "synonymous" with "moral certainty." Thus it is at least as true here, as it was in Cage, that the charge "suggest[ed] a higher degree of doubt than is required for acquittal," and further when the charge is considered as a whole, "it [is] clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." Cage, 111 S.Ct. at 330.

In addition to these similarities, petitioner's case also contains several significant factors not present in Cage which made the misdefinition of reasonable doubt here all the more prejudicial. First, the prosecutors predicted and stressed the erroneous

instructions in their argument to the jury, and admonishing the jury to pay particular attention to this part of the judge's charge. Specifically, the first prosecutor argued the following to the jury:

> You are going to hear a lot about reasonable doubt, over and over. Reasonable doubt. They are probably going to get up here and make some argument about a bird in the hand. All of these arguments that we heard over and over. Well, that's all fine. And a reasonable doubt is not any doubt. You can have a doubt in your mind that Tyner's dead. You haven't even seen his dead body. You haven't seen him buried. You can have a doubt about that. But it's not a reasonable doubt. And what we are talking about a reasonable doubt is a substantial doubt, everything in our lives is subject to some doubt so don't cast off and put on that ship that they will attempt to put you on with reasonable doubt. And you remember what his honor, Judge Laney, tells you. He will tell you that it's real and substantial. Not some imaginary or fanciful doubt that they can come up with.

J.A. 364-65 (Tr. 4113, line 22 to tr. 4114, line 12) (emphasis added).[8] This undue emphasis and erroneous advice highlighted the prejudice of the improper jury instructions. See Clemons v. Mississippi, ___ U.S. ___, 110 S.Ct. 1441, 1451 (1990) (fact that prosecutor stressed erroneous jury instructions in argument is an important consideration in assessing prejudice); California v. Brown, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring) (same).

Another feature of the record in this case which was apparent-

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[8]The second prosecutor to argue warned the jury not to be taken in by doubts that were created by the case since they were not "reasonable."

> [W]hat they want to do is focus on these other issues hoping that you will develop some doubts that are not reasonable but you will confuse them with reasonable doubts. It is trickery.

J.A. 386 (Tr. 4135, lines 22-25).

ly not present in Cage was the trial judge's repeated reminders that whenever he used the term "reasonable doubt," the jury was to recall the meaning of reasonable doubt as "I told you earlier," J.A. 444, and "as you will recall, I told you what beyond a reasonable doubt means." J.A. 611. These insistent reminders, like the prosecutor's emphasis on the instructions in his jury argument, only increased the prejudicial effect of the reasonable doubt instructions in this case.[9]

It is for these reasons that this Court's reasoning in Cage compels that this Court reverse petitioner's conviction and sentence. As was noted above, the trial court's reasonable doubt instruction in petitioner's case contains the same defects identified in Cage. Significantly, the Cage instructions, like those given here, included strong affirmations of the state's duty to prove guilt beyond a reasonable doubt. The erroneous instructions in Cage, moreover, were given by way of contrast to doubt founded upon "mere caprice or conjecture," and to "mere possible doubt." Id. at 329. Similarly, most of the challenged instructions in this case were given by way of contrast to a "weak or a

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[9]Cage controls this case in yet another respect. Here, as in Cage, the lower courts thought the misdefinition of reasonable doubt to have been ameliorated by the context in which it occurred. Like the Louisiana Supreme Court in Cage, the court of appeals panel relied on the fact that the term "substantial" doubt was used by way of contrast to doubts which were merely "imaginary," "slight," or "fanciful." Gaskins v. McKellar, 916 F.2d 941, 952 (4th Cir. 1990). Although the same was undeniably true of the instructions in Cage, this Court recognized that use of such terms as "substantial," "grave," and "moral certainty" nevertheless had the effect of unconstitutionally lessening the state's burden of proof.

slight doubt," and an "imaginary," "slight," and "fanciful" doubt.

III. The Eighth and Fourteenth Amendments were violated by permitting the state at the sentencing phase of petitioner's trial to introduce both evidence that a prior sentence of death imposed upon petitioner had been vacated by the South Carolina Supreme Court and evidence as to why the state did not seek the death penalty in another case against petitioner. This error was exacerbated by the trial court's instructions to the jury.

A. THE EVIDENCE PRESENTED.

A former prosecutor, Kenneth Summerford, was permitted to testify at the penalty phase of petitioner's trial that petitioner had previously been sentenced to death in 1976 for the death of Dennis Bellamy. J.A. 543-44. Additionally, he was permitted to testify that the South Carolina Supreme Court had subsequently declared the death penalty statute under which petitioner had been sentenced unconstitutional and, therefore, had vacated his death sentence and imposed a sentence of life imprisonment. J.A. 544. Finally, Summerford was permitted to explain why he had decided to permit petitioner to enter into a plea bargain agreement for a life sentence in connection with the death of Johnny Knight and others in 1978, as well as why he had not sought the death penalty in that case. Id.

Petitioner does not, of course, dispute that evidence of any prior constitutionally obtained convictions was admissible and

relevant at the penalty phase of his bifurcated trial. However, the fact that he had previously been sentenced to death was certainly not relevant or admissible, and the introduction of this evidence constituted an arbitrary factor. See generally Booth v. Maryland, 482 U.S. 496 (1987).

In Caldwell v. Mississippi, 472 U.S. 372 (1985), this Court held that a prosecutor's comments, during his penalty phase summation, that any sentence of death imposed would be reviewed by the Mississippi Supreme Court violated the Eighth Amendment. This Court reasoned that this type of argument implied that "the responsibility for defendant's death sentence rests elsewhere." 472 U.S. at 380. Thus this Court concluded that because "the jury's sense of responsibility for determining the appropriateness of death" was minimized by the state's argument, the resulting sentence of death did "not meet the standard of reliability that the Eighth Amendment requires." Id.

The constitutional principle established in Caldwell is equally applicable under the facts of this case. The fact that petitioner had been previously sentenced to death, only to have the sentence reversed by the appellate courts and a sentence of life imprisonment imposed, could only have diminished the juror's sense of responsibility for making the awesome determination as to whether petitioner should be sentenced to life imprisonment or the death penalty. See Woodson v. North Carolina, 428 U.S. 280

(1976).[10] Most significantly, the testimony caused the jury to believe that their responsibility for determining petitioner's fate was not final. The issue of appellate review was intentionally injected into the proceedings in a dramatic and misleading fashion. Not only did the testimony of former prosecutor Summerford imply that any death sentence imposed would be fully reviewed by the appellate courts, it also went one step further and expressly stated that, on at least one other occasion, the South Carolina Supreme Court had vacated a death sentence secured against petitioner and required that he be sentenced to life imprisonment. These comments were bolstered by the trial judge's remarks concerning the fact that no valid death penalty law existed at the time of several other prior murders. J.A. 549. Thus the jury was informed not only of the role of the appellate courts, but was also left with the impression that the South Carolina Supreme Court or this Court might again invalidate South Carolina's death penalty statute. The jury was not told, however, that the current statute had been found to meet existing constitutional standards, or that the state courts rarely order that a person be sentenced to life imprisonment if his death sentence is reversed. See State v Shaw, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 957, reh. denied, 444 U.S. 1027 (1979). Thus petitioner's death sentence

[10] See People v. Davis, 452 N.E.2d 525, 537 (Ill. 1983) (Illinois Supreme Court concluded that information that the defendant had been sentenced to death for another murder diminished the jury's sense of responsibility; "knowledge that twelve other people determined that he should be executed could have swayed the juror's verdict in favor of death").

contains the same constitutional flaws found in Caldwell.

Furthermore, this testimony was meant to convey to the jury that petitioner had narrowly escaped the death penalty on prior occasions; once on a mere legal technicality and another time because there was not a valid death penalty law in effect. In essence, the thrust of the testimony was that regardless of whether petitioner should be sentenced to death for the offense he was being tried for--the murder of convicted murderer and death row inmate Rudolph Tyner--he should have been executed for his prior offenses. Further, because a prior death sentence had been vacated by an appellate court, the jury could in effect reimpose that sentence, which was vacated on legal technicalities. The prosecutor's closing arguments made this point in dramatic fashion. Even a cursory review of the state's summations reveals that they concentrated primarily on petitioner's prior offenses. See, e.g., J.A. 574-76; 581-82. While it was permissible to refer to petitioner's prior convictions (assuming they were constitutionally obtained), the evidence regarding his prior death sentence was irrelevant and diminished the jury's responsibility by informing them that another jury, at another time, had determined that petitioner should die. This information was not germane to the jury's sentencing decision, and clearly constituted an arbitrary factor, thus undermining the reliability of the resulting sentence of death.

It was also improper to allow the prosecutor to explain why he did not seek the death penalty against petitioner in 1978.

Allowing Summerford to explain why he believed he could not secure a valid death sentence against petitioner only exacerbated the previously referred to Caldwell errors. The evidence was misleading, and once again injected the issue of the intervention of the appellate courts into the jury's decision making process. Such matters could only have conveyed to the jury that no matter what sentence it imposed, an appellate court would carefully review, and in all likelihood intervene in, any decision it made.

B. THE TRIAL COURT'S CHARGE.

This Caldwell error was exacerbated by the trial judge's penalty phase charge which diminished the jury's sense of responsibility for determining petitioner's fate by instructing the jury that its verdict was merely advisory rather than binding. At the beginning of the penalty phase of petitioner's trial, the trial judge informed the jury:

> 'So our purpose in conducting this proceeding in which we are now engaged is to determine whether the defendant Donald "Pee Wee" Gaskins should be sentenced by the court to death or life imprisonment. With respect to your particular role in this proceeding, you will be asked to recommend to the Court whether it should sentence the defendant, Donald "Pee Wee" Gaskins to death or to life imprisonment.

J.A. 501. The court went on, in his opening remarks, to describe the jury's role as being that of making a sentencing recommendation on four other occasions. During his charge at the conclusion of the penalty phase, the trial judge described the jury's role as being to recommend a sentence, or to issue a recommendation, at least forty times. J.A. 610-21. The trial judge never instructed the jury that its verdict was in fact binding, and that the

sentence the jury recommended would in fact be the sentence imposed by the court. The written statutory sentencing forms submitted for the jury's use in determining petitioner's sentence again referred to the decision as a "recommendation of sentence," and the language of the verdict form was that the jurors "recommend to the court" that the defendant "Donald "Pee Wee" Gaskins be sentenced to death." Tr. 4546-48. These misleading instructions violated the Eighth Amendment principles set forth in Caldwell v. Mississippi, 472 U.S. 320 (1985).

First, the jury's sentencing decision is not advisory. S.C. Code §16-3-20(C) (1988 Cum. Supp.) provides that "[w]here a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death." (emphasis added). The effect of this statutory provision, as the South Carolina Supreme Court recognized in State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 957 (1979), is that "[w]hen the trial jury is the sentencing authority, its recommendation for punishment is binding on the court." Id. at 802.

The trial judge in this case did not merely refer to the jury's sentencing verdict as a "recommendation." He also prefaced his charge with a misleading and prejudicial series of statements indicating that he would impose sentence on the murder charge, and that the jury's function was merely to assist him in determining the sentence he would impose. The remainder of the judge's introductory remarks emphasized that the judge, not the jury, would actually impose petitioner's sentence. In assessing the effect of

these introductory remarks, it must be kept in mind that in its plain and ordinary meaning, the term "`[r]ecommendation' refers to an action which is advisory in nature rather than one having any binding effect." Black's Law Dictionary 1144 (5th Ed. 1979). Similarly, "recommend" means "to counsel or advise." American Heritage Dictionary 1034 (College Ed.2d 1982). Given this commonly accepted usage of the term "recommend," a term which the trial judge used no fewer than forty-six times throughout his opening remarks and penalty phase charge, it was obviously essential that the jury understand that its sentencing was in fact not advisory but binding, and that its sentencing recommendation would actually be imposed as the sentence of the court. The trial judge's charge, however, had just the opposite effect. Instead of making clear that the jury would make the actual determination of petitioner's, the trial judge stressed that he would be the one to impose sentence, and characterized the jury's role as one of rendering assistance to the judge in the determination of what that sentence should be. Under these circumstances, it is impossible that any member of the jury recognized the true gravity of their sentencing responsibility.

In Caldwell, this Court held that a prosecutor's jury argument, which suggested that the state supreme court would review the appropriateness of any death sentence which the jury might impose, violated the Eighth Amendment. This Court concluded that this type of argument minimized "the jury's sense of responsibility for determining the appropriateness of death," and that such

tactics created a constitutionally-intolerable risk of unreliability and bias in the sentencing process. 472 U.S. at 330-34, 341. Caldwell established that the error involved in this case was a federal constitutional violation, and thus that review of this claim must be governed by federal constitutional standards.[11] As other courts have recognized, the Caldwell principle necessarily covers comments or instructions by the trial judge which indicate that the jury's role in the proceedings is merely advisory. See Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987) (en banc), rev'd on procedural grounds, ___ U.S. ___, 109 S.Ct. 1211 (1989); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied ___ U.S. ___, 109 S.Ct. 1353 (1989); Frye v. Commonwealth, 345 S.E.2d 267 (Va. 1986).

In addition, Caldwell establishes an extremely stringent standard of appellate review. Pursuant to Caldwell, a statement by a trial judge or prosecutor, which a reasonable juror might interpret as lessening the jury's responsibility, requires that any ensuing death sentence be vacated unless the reviewing court can say that the statement "had no effect on the sentencing decision." 472 U.S. at 341; see also Parker v. Dugger, ___ U.S. ___, 111 S.Ct. 731 (1991). This rigorous "no-effect" standard makes it extremely difficult for the state to demonstrate that a Caldwell error was

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[11]Therefore, this Court may not simply rely on the intended legal import of the trial judge's instructions, but rather must pay "careful attention to the words actually spoken to the jury, . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom v. Montana, 442 U.S. 510, 514 (1979); see also Mills v. Maryland, 486 U.S. 367 (1988).

harmless beyond a reasonable doubt, especially under the facts of this case, where there was substantial mitigating evidence presented at trial.

The error which the trial judge committed here was as unnecessary as it was unfair. Even before Caldwell, the large majority of South Carolina trial judges had made a practice of clearly advising capital sentencing juries of the binding nature of their recommendation.[12] In this way, the majority of the state trial judges in South Carolina have faithfully adhered to the principle set forth in Caldwell and thus avoided the risk that "[a] defendant might . . . be executed, although no sentencer had ever made a determination that death was the appropriate sentence." 472 U.S. at 331-332.

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[12]Typical of these instructions is the following charge given by Judge William H. Ballenger in State v. Smith, 286 S.C. 406, 334 S.E.2d 277 (1985), cert. denied, 475 U.S. 1031 (1986):

> You will notice that I have used the word "recommendation" in referring to your decision on the question of what punishment the defendant should receive. I have used this word because it is the word used in the statute itself. But it is important to understand that your decision as to the sentence is really more than a "recommendation" as you or I might use that word in everyday speech. I tell you this because the law provides that whatever your recommendation is, I as the trial judge accept it. Therefore, you should understand that whatever your recommendation might be, that recommendation will in fact be the sentence which will be imposed upon the defendant.

Id., Transcript of Record at 1285.

IV. The malice instructions given at petitioner's trial were not harmless beyond a reasonable doubt.

The South Carolina Supreme Court held on direct appeal that the trial court's charge regarding presumed malice was an impermissible burden shifting instruction. State v. Gaskins, 284 S.C. at 120.[13] The court determined, however, that the constitutional error was harmless beyond a reasonable doubt. Id. at 122. The magistrate, district court, and the court of appeals concurred that the malice instruction was an unconstitutional burden shifting instruction. J.A. 1180-81; 1326-27; see also Francis v. Franklin, 471 U.S. 307 (1985); Hyman v. Aiken, 824 F.2d 1405 (4th Cir. 1987) (identical instruction found to violate Francis). However, they also determined that the error was harmless.

The harmless error decision rendered by the courts below cannot withstand an analysis of the record evidence. In Rose v. Clark, 478 U.S. 570 (1986), the Supreme Court adopted the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), to determine whether a burden shifting instruction was harmless beyond a reasonable doubt. Thus, pursuant to Rose, a court reviewing the effect of an impermissible burden shifting instruction must determine "whether the evidence is so dispositive of [malice] that [the] reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption."

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[13]The relevant part of the court's charge was: "I charge you further that while malice is presumed from the use of a deadly weapon or from a dangerous instrument . . . ." J.A. 442.

478 U.S. at 583.[14]

In this case, the evidence of malice was far from overwhelming. The cause of death was an explosion, but the primary evidence of malice came from several murderers, also incarcerated in CB-2.[15] Thus it cannot be said that the state has proved

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[14]It is also must be noted that this Court has heard argument in Yates v. Aiken, ___ S.C. ___, 391 S.E.2d 530 (1989), cert. granted, 111 S.Ct. 41 (1990) (No. 89-7691), to consider the following three questions:

> Does South Carolina's "harmless error" analysis of the Sandstrom errors in this case, in which the state court considered neither petitioner's defense nor the jury's likely interpretation of the unconstitutional instructions, conflict with the requirements of Rose v. Clark and Carella v. California?
>
> Should the Court grant certiorari to enforce its two prior remand orders instructing the South Carolina Supreme Court "to grant the relief which federal law requires?"
>
> Should the Court grant certiorari to clarify the harmless-error analysis to be employed in cases involving burden-shifting mandatory presumptions?

The same harmless error analysis utilized by the South Carolina Supreme Court in Yates v. Aiken was utilized by the lower courts in petitioner's case.

[15]The state court's harmless error determination rested on two erroneous grounds. First, the court believed that the error was harmless because petitioner did not dispute that the killing was done intentionally. State v. Gaskins, 284 S.C. at 121. This is clearly incorrect. The state has the burden of proof on all the essential elements of the crime, malice of course being one of the elements of murder, and a defendant can elect to put the state to its burden of proof without that constituting some sort of waiver. Second, the state court held that the charge was harmless because petitioner admitted at the penalty phase of his trial that he was involved in the conspiracy to kill Tyner but did not actually participate in the killing. Id. at 123. This also is incorrect. The jury had already found petitioner guilty of murder (after receiving the impermissible instruction), thus petitioner's statement to the jury at a subsequent stage of the proceedings regarding why he should not receive the death penalty cannot

beyond a reasonable doubt, which is its burden, that the jury could not have relied upon the presumption in determining that the killing was performed with malice. For this reason, the error was not harmless beyond a reasonable doubt, and petitioner's conviction is constitutionally infirm.

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fairly--or constitutionally--support a determination that the burden shifting malice charge was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

JOHN H. BLUME
FRANKLIN W. DRAPER
Attorneys at Law

South Carolina Death
Penalty Resource Center
P.O. Box 11311
Columbia, SC 29211

BY: _____
ATTORNEYS FOR PETITIONER

March 15, 1991.

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Donald Henry GASKINS, Petitioner-Appellant,

v.

Kenneth D. McKELLAR, Warden, Central Correctional Institution; Attorney General of South Carolina, T. Travis Medlock, Respondents-Appellees.

No. 89-4011.

United States Court of Appeals, Fourth Circuit.

Argued March 7, 1990.

Decided Oct. 15, 1990.

Defendant, whose murder conviction and death sentence had been affirmed by South Carolina Supreme Court, 284 S.C. 105, 326 S.E.2d 132, sought federal habeas corpus review. The United States District Court for the District of South Carolina, George Ross Anderson, Jr., J., dismissed habeas petition without evidentiary hearing. Defendant appealed. The Court of Appeals, Phillips, Circuit Judge, held that: (1) dismissal was appropriate of invalid-use-of-confession claim on basis of its palpably incredible nature and, in any event, denial of evidentiary hearing was harmless beyond reasonable doubt; (2) state trial judge's questioning of certain witnesses did not render defendant's trial fundamentally unfair; (3) state trial judge's comment to press following guilt phase of trial did not create fundamentally unfair trial; (4) trial court's refusal to exclude juror who admitted during voir dire that, in his opinion, defendant should have been executed for previous murders, was not constitutional error; (5) any impropriety in restricting defendant's cross-examination of prosecution witness on direct examination of defense witness was harmless beyond reasonable doubt; (6) improper burden shifting instruction was harmless beyond reasonable doubt; and (7) admission of evidence that prior death sentence of defendant had been vacated did not violate defendant's Eighth Amendment rights, nor did trial court's use of word "recommend" in connection with jury's return of sentence of life imprisonment or death.

Affirmed.

1. Habeas Corpus ⇐742

Where allegations in a habeas petition are palpably incredible, petition properly may be dismissed without affording any evidentiary hearing. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐751

Palpably incredible nature of habeas claim of state capital prisoner, that sentencing jury might have acted differently had it thought defendant guilty of "some" lesser number of unrelated murders that defendant specifically conceded rather than seven unrelated murders to which defendant had confessed and pled guilty, supported dismissal, without evidentiary hearing, of claim that defendant's confession to those prior murders was improperly admitted during sentencing phase of capital murder trial. 28 U.S.C.A. § 2254.

3. Habeas Corpus ⇐847

Any error in denying state capital prisoner evidentiary hearing on habeas claim that sentencing jury was allowed to erroneously believe that he had committed seven unrelated murders to which he confessed, rather than some lesser number which he conceded, was harmless beyond reasonable doubt; jury had before it other evidence to support aggravating factor of prior murder convictions, in form of still another conviction of murder which defendant did not challenge, and additional aggravating factor of murder for hire was not challenged. 28 U.S.C.A. § 2254.

4. Habeas Corpus ⇐481

Any error in trial court's involvement in questioning prosecution witness whose testimony tied defendant to murder or in questioning defense witness was harmless beyond reasonable doubt where, even without prosecution witness' testimony, evidence of defendants' involvement in plot to kill victim was overwhelming; thus, trial was not fundamentally unfair on theory that trial judge's questioning may have led jury to believe that prosecution witness'

theory, not theory of defense witness, was more credible. U.S.C.A. Const.Amend. 14.

5. Criminal Law ⇐655(1)

Trial judge's response, when asked by reporter before conclusion of sentencing phase of capital murder trial whether he thought jury would impose death penalty, of "What can you give a man who has got ten life sentences," although of questionable propriety, did not deprive defendant of fundamentally fair trial; there was no evidence that newspaper was read by any members of sequestered jury or that, by making statement, trial judge allowed arbitrary factors to enter into jury's deliberation. U.S.C.A. Const.Amend. 14.

6. Jury ⇐108

Trial court's refusal to dismiss juror for cause in capital murder prosecution did not violate defendant's Sixth Amendment right to impartial jury where, although juror indicated that he believed defendant should have been sentenced to death upon conviction of unrelated prior murders, juror's voir dire testimony indicated that juror was not irrevocably committed to imposing death penalty in case before court and defendant did not, after challenge for cause was rejected, elect to exercise peremptory challenge against juror. U.S.C.A. Const.Amend. 6.

7. Witnesses ⇐330(1)

Defendant has fundamental right to effective cross-examination on matters bearing on witnesses' credibility. U.S.C.A. Const.Amend. 14.

8. Witnesses ⇐349

Discretionary refusal, in capital murder case involving prison murder, to allow defendant to cross-examine prosecution witness, regarding prosecution witness' attempts to put blame on others for prior murders of which prosecution witness had been convicted, did not deny defendant any federal constitutional right; in light of defendant's use of other ample opportunities to impeach prosecution witness' credibility and overwhelming evidence of defendant's guilt, any abuse of trial court's discretion in limiting cross-examination was harmless beyond reasonable doubt. U.S.C.A. Const. Amend. 14.

9. Criminal Law ⇐1170½(1)

Any improper restriction by trial court on capital murder defendants' direct examination of defense witness was harmless beyond reasonable doubt where evidence, which was excluded on hearsay grounds, was ultimately adduced during cross-examination of same witness.

10. Constitutional Law ⇐268(10)
Witnesses ⇐2(1)

Criminal defendant's right to compel testimony is fundamental to Sixth and Fourteenth Amendment due process rights. U.S.C.A. Const.Amends. 6, 14.

11. Witnesses ⇐308

When witness indicates that he will assert Fifth Amendment privilege, trial judge must make proper and particularized inquiry into legitimacy and scope of witnesses' assertion of privilege; witness may be totally excused only if court finds that witness could legitimately refuse to answer any and all relevant questions. U.S.C.A. Const.Amend. 5.

12. Criminal Law ⇐1170½(1)

Any error in refusing to require witness, who trial court had been informed would assert his Fifth Amendment right not to testify, to assert Fifth Amendment privilege before jury was harmless where witness' testimony would have been merely cumulative; fact that defendant did not elect to offer witness' expected testimony in state postconviction proceeding strongly suggested defendant's own estimate of its slight probative value. U.S.C.A. Const. Amends. 5, 6, 14.

13. Criminal Law ⇐721(1)

In assessing alleged improper comment on defendant's failure to testify, question is whether disputed statements so infected trial and sentencing with unfairness that ultimate conviction and sentence constituted denial of due process. U.S.C.A. Const.Amend. 5.

14. Criminal Law ⇐721(5)

Prosecution's closing argument, in which prosecutor referred to 14 "undisputed" pieces of evidence, did not constitute improper comment on defendant's failure to testify where defendant presumably could have sought testimony of voice and handwriting analysts and other witnesses to dispute cited items. U.S.C.A. Const. Amend. 5.

15. Criminal Law ⇐721(3)

State's argument during sentencing phase of capital murder trial, to effect that defendant had shown no remorse, did not constitute improper comment on defendant's refusal to testify during guilt phase of trial, where comment was directed toward defendant's anticipated speech during sentencing argument and fact that he had shown no remorse for previous murders of which he had been convicted, which had been introduced as aggravating factors. U.S.C.A. Const.Amend. 5.

16. Criminal Law ⇐1172.2

Even where instruction constitutes impermissible burden-shifting, any error in giving it may be found harmless if reviewing court can say beyond reasonable doubt that jury would have found it unnecessary to rely on burden-shifting presumption in order to convict.

17. Criminal Law ⇐1172.2

Instruction which impermissibly shifted burden on issue of malice in homicide prosecution was harmless error, where beyond reasonable doubt jury would have found it unnecessary to rely on presumption; given overwhelming evidence of guilt it was difficult to see how jury could not have concluded, even without presumption, that killing was done with malice.

18. Constitutional Law ⇐268(11)
Criminal Law ⇐789(7)

Substantial doubt portion of reasonable doubt instruction did not rise to level of due process violation where trial judge's use of term "substantial doubt" was, in context of entire instruction, more accurate than when viewed in artificial isolation, was employed in instruction to contrast reasonable doubt with "some imaginary doubt or some slight doubt," and was not likely to mislead jury. U.S.C.A. Const. Amend. 14.

19. Homicide ⇐358(1)

Allowing evidence in penalty phase of capital murder prosecution that prior death sentence that defendant had received in another case had been vacated was not constitutional error on theory that it could have led jury to believe that any death penalty it might impose was advisory only; such evidence did not improperly describe role assigned to jury by local law and most that reasonable jury could have made of evidence was that statute under which jury was to sentence defendant might conceivably be held unconstitutional at later date. U.S.C.A. Const.Amend. 8.

20. Criminal Law ⇐796, 805(3)

Trial court's use over 40 times of words to effect it was jury's responsibility to "recommend" that the court sentence defendant to life imprisonment or death, could not have reasonably led jury to believe that any death penalty it might impose would be advisory only, thereby diminishing jurors' sense of responsibility, where there was no implication anywhere in case that jury's recommendation was nonbinding; however, it would have been wiser for trial court to explicitly instruct jury that word "recommendation" meant binding recommendation. U.S.C.A. Const. Amend. 8.

21. Homicide ⇐358(1)

Allowing testimony concerning defendant's prior vacated death sentence in another homicide case did not introduce arbitrary factors into sentencing decision in capital murder prosecution, even if evidence was of limited, if any, relevance to jury's decision whether to impose death penalty; defendant argued that evidence improperly suggested to jury, that regardless of its determination of whether defendant should be sentenced to death for murder involved in case, jury could properly reimpose earlier death penalty which had been vacated because of legal technicality.

22. Habeas Corpus ⇐379

Habeas petitioner's contention that sympathy instruction given to jury in sentencing phase of capital murder prosecution constituted Eighth Amendment violation by effectively precluding jury from considering relevant mitigating evidence in violation of Eighth Amendment was foreclosed, since any such ruling would constitute "new rule," which could not be announced or applied in habeas case on collateral review. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 8.

23. Homicide ⇐311

Challenged instruction in capital murder case did not impermissibly suggest to sentencing jury that mitigating circumstances must be found beyond reasonable doubt; instruction stated that it was not required for jury to find beyond reasonable doubt existence of at least one alleged statutory mitigating circumstance in order to recommend defendant be given life sentence. U.S.C.A. Const.Amend. 8.

24. Criminal Law ⇐796, 822(1)

Trial court's presumably unintentional statement, to effect that jury had to find at least one or more aggravating circumstances or else it would "have to recommend a death sentence," could not, in context of entire charge, have confused reasonable juror and thus was not constitutional error, where trial court instructions made patently clear that death penalty could not be imposed without aggravating circumstances and that jury had, in any case, full discretion not to impose death sentence, even if aggravating circumstances and no mitigating circumstances were found. U.S.C.A. Const.Amend. 8.

25. Criminal Law ⇐79ℰ

Trial court's misstatement of South Carolina law in capital murder prosecution, by instructing jury to effect that decision to impose life sentence must be unanimous, did not constitute arbitrary factor in sentencing process, rendering unanimous death sentence unreliable, where it was inconceivable that disputed instruction would have caused jurors unanimously to impose death sentence out of fear of mistrial should they not be unanimous in their decision to impose life sentence. U.S.C.A. Const.Amend. 8.

John Henry Blume, III (argued), South Carolina Death Penalty Resource Center, Columbia, S.C., for petitioner-appellant.

Frank Louis Valenta, Jr., Asst. Atty. Gen., Donald J. Zelenka, Chief Deputy Atty. Gen., T. Travis Medlock, Atty. Gen. (on brief), Columbia, S.C., for respondents-appellees.

Before ERVIN, Chief Judge, and PHILLIPS and CHAPMAN, Circuit Judges.

PHILLIPS, Circuit Judge:

Donald Henry Gaskins, a South Carolina prison inmate under sentence of death for capital murder, appeals the district court's denial of an evidentiary hearing and dismissal of his 28 U.S.C. § 2254 petition for failure to show entitlement to federal collateral relief. We affirm.

I

Gaskins' victim, fellow death row inmate Rudolph Tyner, had been sentenced to death for killing a Mr. and Mrs. Moon during a robbery. Tony Cimo, a stepson of the Moons, seeking to avenge the murders, contacted an acquaintance who put him in touch with Gaskins, who was serving ten life sentences, nine for murder and one for burglary. Telephone toll records produced at trial showed that thereafter Gaskins made a number of collect calls either to Cimo or to Cimo's acquaintance who had made the contact. Some of the recorded calls revealed that, after numerous failed attempts to poison Tyner, Gaskins resolved to kill Tyner by means of an explosive device.

Ultimately, Gaskins succeeded. James Arthur Brown, a prisoner assigned to deliver meals to death-row inmates, testified that on the afternoon of the murder, Gaskins asked Brown to deliver a device to Tyner. Brown described the device as a radio-type speaker built into a plastic cup through which, Gaskins led Brown to believe, Tyner could communicate with Gaskins in the adjoining cell rather than having to yell through a common vent. The bottom of the cup had a female-electrical socket adapted for connection to an extension cord. Along with the cup's delivery Brown was to tell Tyner that " 'the wire was in the bottom vent in his cell.' " *See State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132, 136 (1985). Presumably, Tyner then found the wire in the common vent and plugged it into the cup-speaker. The cup exploded, blowing off part of Tyner's head and killing him. Brown testified that after the explosion he went to Gaskins' cell and saw Gaskins pulling a wire from the common vent in his own cell.

Gaskins was convicted and sentenced to death by a jury, and his conviction and sentence were affirmed on direct appeal. *See State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985). Efforts to obtain state post-conviction relief were unavailing. *See Gaskins v. State*, No. 85-CP-40-3466, Letter Order (S.C. Jan. 7, 1987), *cert. denied*, 482 U.S. 909, 107 S.Ct. 2491, 96 L.Ed.2d 382 (1987).

This § 2254 petition, raising several claims, followed and was summarily dismissed by the district court. A number of issues and sub-issues are raised on appeal. Of these, one involves the denial of an evidentiary hearing respecting the admission in evidence at sentencing of an earlier confession to other murders, one involves a claimed denial of due process by virtue of trial judge bias, two involve alleged constitutional violations in jury selection, three involve trial court evidentiary rulings allegedly impacting on the trial's fundamental fairness, one involves prosecutorial misconduct, two involve guilt-phase jury instructions, and five involve alleged errors during the trial's sentencing phase.

We address each of these in turn.

1. *Cf. United States v. Jones*, 907 F.2d 456, 460–69 (4th Cir.1990), and *id.* at 470–84 (dissenting opinion) (conflicting views on constitutional power of federal sentencing court to entertain collateral challenge to validity of prior state court conviction invoked for sentence enhancement purposes).

II

Gaskins contends that he was erroneously denied an evidentiary hearing to establish his claim that portions of a confession given by him in connection with an earlier, bargained plea of guilty to several unrelated murders were unconstitutionally admitted at the sentencing phase of his Tyner murder trial.

The district court summarily dismissed this invalid-use-of-confession claim on the stated basis that "[t]here is no reason, and no precedent, for arguing the confession's invalidity for the first time during the sentencing phase of a trial for a subsequent crime five years later ... [rather than] in a collateral proceeding directed at those prior crimes." On this appeal, the parties have joined issue on this threshold question of the habeas court's power to entertain this claim. Because it is a difficult issue with broad and unclear implications,[1] and because there is an alternative basis for upholding the summary dismissal, we decline to rest decision upon the district court's stated basis for dismissing the claim.

To address the alternative basis, it is necessary first to identify the exact nature of Gaskins' constitutional claim. We take it to be that because the earlier confession was coerced, hence involuntarily given, hence unconstitutionally obtained, its use in evidence in the sentencing phase of the later Tyner trial violated Gaskins' eighth amendment right to a "reliab[le] ... determination that death is the appropriate punishment." *Johnson v. Mississippi*, 486 U.S. 578, 584, 108 S.Ct. 1981, 1986, 100 L.Ed.2d 575 (1988) (death penalty predicated in part on prior conviction vacated because coerced confession violates eighth amendment) (quoting *Gardner v. Florida*, 430 U.S. 349, 363–64, 97 S.Ct. 1197, 1207–08, 51 L.Ed.2d 393 (1977)).

The claim is rested on the undisputed fact that at Gaskins' sentencing hearing, a state solicitor was allowed, over Gaskins' timely objection, to read portions of the

earlier confession in which Gaskins had admitted committing seven other murders. Though in personally arguing his case to the sentencing jury Gaskins specifically conceded that, "I'm guilty of some of [the murders], yes. I do not deny that," J.A. at 593, his contention apparently now is that he was coerced into confessing to more than he later conceded to the sentencing jury. From this, the argument runs that the sentencing jury's determination could be shown to be constitutionally unreliable if, as he claimed but was not allowed to establish by evidence, the jury thought him guilty of all the seven murders rather than the "some" lesser number that he specifically conceded. Given this possibility, Gaskins contends that the district court erred in failing to give him an evidentiary hearing to attempt to establish his claim of constitutional unreliability.

[1, 2] This argument fails because of the claim's facial lack of merit. Where the allegations in a habeas petition are palpably incredible, the petition properly may be dismissed without affording any evidentiary hearing. *See Blackledge v. Allison*, 431 U.S. 63, 75–76, 97 S.Ct. 1621, 1629–30, 52 L.Ed.2d 136 (1977). Here the ultimate allegation, on which habeas relief depended, was that the sentencing jury's misperception of the exact number of unrelated murders that Gaskins had committed made its imposition of the death penalty constitutionally unreliable. Under the circumstances, the district court properly could have viewed this as an allegation incredible on its face, and on that basis summarily dismissed the claim. Even assuming the truth of the predicate allegation—that the earlier confession had admitted more murders than Gaskins actually had committed—it defies belief that a jury to which he had just renewed his confession to at least an indefinite "some" of the *seven* earlier confessed would have acted differently (more reliably) had it been aware of the exact mathematical disparity between those actually committed and those confessed.

[3] We might also affirm the summary dismissal of this claim on the alternative basis of a roughly parallel harmless error analysis. *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (harmless error analysis appropriate in review of capital sentencing proceeding). Here the record shows that the state sentencing jury found two aggravating factors: prior murder convictions and murder for hire. It also reveals that the jury had before it, in addition to the earlier confessed murders, still another prior conviction of murder by jury verdict. Both this latter conviction and the murder-for-hire finding stand unchallenged.[2] As earlier indicated, the most favorable result that could be achieved by an evidentiary hearing to challenge the sentencing jury's finding of prior murders as an aggravator would be a demonstration that the jury erroneously believed that Gaskins had committed seven confessed murders, when he had only committed "some" number less than that. When it is recalled that the jury also had before it still another unchallenged murder conviction by jury trial, it is obvious that any error in denying an evidentiary hearing with such a limited potential was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

III

[4] We next consider the district court's dismissal of Gaskins' claim that the state trial judge's demonstrated bias and lack of impartiality made his state trial fundamentally unfair and therefore violated his constitutional right to due process.

2. The parties do not raise and we therefore do not address the possible bearing on this point of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (where capital sentencing jurors have found two aggravators, invalidation of one on review does not require vacating death sentence), and *Smith v. Procunier*, 769 F.2d 170 (4th Cir.1985), *aff'd on other grounds*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (constitutional invalidity of one finding of aggravating factor does not require vacating death penalty where another aggravator is unchallenged).

fourteenth amendment due process requires, at a minimum, an impartial judge and jury. *See Anderson v. Warden, Md. Penitentiary*, 696 F.2d 296, 299 (4th Cir. 1982). Gaskins makes a number of arguments supporting his contention that the state trial judge demonstrably was lacking in the requisite degree of impartiality to ensure due process. First, he points to twenty-two instances where the state trial judge allegedly improperly questioned witnesses. Second, he points to a newspaper article published after the guilt phase of Gaskins' trial, but before sentencing, in which the trial judge, in response to a reporter's question whether the judge thought Gaskins would receive the death penalty, replied, "what can you give a man who has got ten life sentences."

We are persuaded upon a careful review of the record that the judge's conduct did not deny Gaskins a constitutionally fair trial.

Of the twenty-two alleged instances where the trial judge questioned witnesses, Gaskins asserts the following as examples the most "egregious" demonstrations of impermissible bias. These occurred during the questioning of state's witness James Brown and Gaskins' chief rebuttal witness to Brown's testimony, John Caison.

It will be recalled that Brown was the inmate who, allegedly at Gaskins' behest, actually delivered the bomb to Tyner, and who testified to that effect at trial. The allegedly prejudicial conduct occurred when the state attempted to introduce through Brown certain incriminating letters that Gaskins had given Brown. After Brown testified that Gaskins had given him the letters, but before the letters were introduced, the trial judge conducted a hearing outside the hearing of the jury to determine the letters' admissibility. When the jury returned, the trial judge, even though Brown had already testified to the source of the letters, asked Brown to "reiterate where he got the documents from for the jury." J.A. at 214.

During Brown's cross-examination, Gaskins attempted to establish that the letters were not incriminating. After sustaining an objection to a question concerning the intent of a phrase in the letter, the trial judge asked Brown directly what the letters meant to him. When Brown responded that they meant that Gaskins was trying to talk Brown into "taking the rap for it," the trial judge commented, "[t]hat's right. That's what he thought." J.A. at 269.

During the state's cross-examination of Gaskins' rebuttal witness, John Caison, Caison testified that Brown told Caison that Brown and others were plotting to get Tyner. When Caison testified that Brown did not reveal other members of the plot, the following colloquy occurred between the trial judge and Caison:

THE COURT: You didn't ask [Brown who the other members of the plot were?]

CAISON: No, he said ...

THE COURT: It's such a big event, weren't you curious?

CAISON: What he told me, he said ...

THE COURT: Tell the truth now. Did you ask him?

CAISON: I asked him what it was about.

THE COURT: Did he tell you?

CAISON: No sir, he ...

THE COURT: He wouldn't tell you?

CAISON: He told me the less that I knew the better off I was.

THE COURT: He delivered the explosives for somebody else?

CAISON: I guess so. He didn't tell me that.

THE COURT: He didn't tell you that. Tell the jury what he told you?

J.A. at 336–37.

Later, after Caison's redirect testimony concerning Brown's alleged involvement in an earlier attempt to poison Tyner, the trial judge again engaged in a colloquy with Caison:

MR. SWERLING: Who told you not to go on Death Row [the day Tyner was killed]?

CAISON: James Brown.

* * * * * *

THE COURT: Why did he tell you that?

CAISON: He didn't want me to go on there to know about nothing. He wanted me to stay away from death row.
THE COURT: All right. What did he have against Rudolph Tyner? Why did he want to kill him?
CAISON: For the money.

* * * * * *

THE COURT: [Where did the money come from?]

* * * * * *

CAISON: I don't know. He didn't say.
THE COURT: And you didn't ask?
CAISON: He wouldn't have told me anyhow.

* * * * * *

THE COURT: Why didn't you ask him who paid him money?

* * * * * *

CAISON: Well, when somebody don't want to answer your question, you best leave them alone.

J.A. 343–47.

Gaskins argues that the trial judge's engagement with Brown and Caison reflected to the jury that Brown's theory, and not Caison's theory, was credible. This, argues Gaskins, rendered the trial fundamentally unfair, especially when coupled with the following accessory-before-the-fact jury instruction:

> [Y]ou must be convinced as I told you that the Defendant here aided, counseled, or otherwise procured James Brown to commit the murder of Rudolph Tyner and that the Defendant was not present either actually or constructively.

J.A. 446. The instruction, argues Gaskins, simply incorporated the state's theory of the offense into the charge.

Although these various instances of involvement by the trial judge might, in isolation, have damaged Gaskins' ability to discredit Brown's testimony, taken in the context of the entire trial, the trial judge's involvement did not render the trial fundamentally unfair. The record evidence of Gaskins' involvement in the plot to kill Tyner, even without Brown's testimony, was overwhelming. We therefore hold that any error in the trial court's involvement was harmless beyond a reasonable doubt. *See Anderson*, 696 F.2d at 299. Moreover, we fail to understand how the disputed jury instruction was in any way erroneous and we are directed to no case law to that effect. On the evidence of record, this was a proper instruction concerning what the jury had to find before it could convict Gaskins of murder or accessory before the fact to murder.

[5] Finally, respecting the trial judge's alleged statement to the newspaper, although we seriously question the propriety of such a statement if actually made, there is no evidence that the newspaper was read by any members of the sequestered jury or that by making the statement the trial judge allowed arbitrary factors to enter into the jury's deliberation. The judge himself did not of course decide the sentence to be imposed.

We therefore affirm the district court's rejection of the claim of a denial of due process by virtue of the trial judge's lack of impartiality.

IV

[6] We next consider related claims respecting the jury selection process.

Of ten peremptory challenges available to Gaskins, three were exercised to exclude jurors Rhyne, Richardson, and Cecil. Gaskins argues that, for various reasons, the trial court erroneously refused to excuse these jurors for cause. Of the jurors who did sit, Gaskins argues that the trial court erroneously refused to excuse juror Doster for cause.

Gaskins rightly makes no claim that requiring him to use peremptory challenges to exclude jurors Rhyne, Richardson, and Cecil violated his fourteenth amendment right to due process by arbitrarily depriving him of the full complement of peremptory challenges allowed by South Carolina law. *See Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). The crux of Gaskins' claim in this regard is that he was denied his sixth amendment right to an impartial jury.

"Any claim that the jury was not impartial ... must focus ... on the jurors who actually sat" and cannot be established simply by showing the loss of a peremptory challenge. *Id.* at 86, 108 S.Ct. at 2277. Accordingly, we examine Gaskins' claim in light of the jurors who actually sat.

Of the jurors who actually sat, Gaskins only challenges the impartiality of juror Doster, whom Gaskins unsuccessfully challenged for cause but did not then challenge peremptorily. Doster admitted on *voir dire* that his "honest opinion is that [Gaskins] was found guilty, convicted of those earlier murders, [and] he should have been executed at that time." J.A. 110. Moreover, upon questioning by the trial court, Doster stated that, if Gaskins were found guilty of Tyner's murder, and that if it were shown that Gaskins had murdered before, Doster would be predisposed to impose a death penalty. Though he concedes that Doster was capable of impartially determining guilt or innocence, Gaskins contends that Doster should have been excused for cause because Doster's ability to consider a life sentence would be substantially impaired by his belief that Gaskins should have received the death penalty for the previous murders.

While it may be true that Doster was predisposed in favor of the death penalty, we find no constitutional error in the trial court's refusal to exclude him. First, it is important to note that Gaskins elected not to use an available peremptory challenge to remove Doster. Though not dispositive, this is some indication that, at the time, the trial judge and Gaskins, both of whom had opportunity to observe Doster's demeanor, felt that Doster would act impartially. The controlling principle here is that "the most that can be demanded of a venireman ... is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed." *Witherspoon v. Illinois*, 391 U.S. 510, 522 n. 21, 88 S.Ct. 1770, 1777 n. 21, 20 L.Ed.2d 776 (1968) (emphasis in original). Our examination of Doster's *voir dire* testimony convinces us that the district judge did not err in concluding that he was not irrevocably committed. At numerous times during questioning, Doster stated that he could give a life sentence, even in the presence of aggravating circumstances. Doster stated that, though he could not with certainty say that the prior conviction would not affect his thoughts on sentencing, when it came time actually to impose the death sentence, he did not know how he would vote. Under the circumstances, we cannot say that Doster's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980).

Accordingly, we agree with the district court that the trial court's refusal to dismiss Doster for cause did not violate Gaskins' sixth amendment right to an impartial jury.

V

During the course of the trial, the trial court made three evidentiary rulings which, Gaskins argues, rendered his trial fundamentally unfair. The first involved Gaskins' cross-examination of James Brown; the second involved Gaskins' direct examination of John Caison; the third involved allowing a material witness to assert the fifth amendment.

During cross-examination of Brown, Gaskins sought to discredit Brown with questions concerning Brown's attempts to blame on others the two prior murders of which he had been convicted. This evidence, argues Gaskins, constituted not only an attack on Brown's credibility, but would also have buttressed Gaskins' theory that Brown, not Gaskins, had conceived and executed Tyner's murder. The trial court excluded this evidence based upon the general South Carolina rule that only the fact of a conviction of a crime of moral turpitude is admissible. On appeal, the South Carolina Supreme Court held that, to the extent the trial court's ruling was erroneous, such error was harmless. *See Gaskins*, 326 S.E.2d at 139–40. We agree.

[7, 8] Absent "circumstances impugning fundamental fairness or infringing spe-

cific constitutional protections," admissibility of evidence does not present a federal question. *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir.1960). Nevertheless, the defendant has a fundamental right to effective cross-examination on matters bearing on the witness' credibility. *See Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). We agree with the district court that the trial judge's discretionary refusal to allow this particular line of cross-examination did not deny any federal constitutional right, if indeed it constituted an abuse of discretion under state law.

Although Gaskins was not permitted to elicit from Brown the circumstances surrounding his other convictions, Gaskins availed himself of ample opportunities to discredit Brown's testimony. For example, during cross-examination, Brown revealed that, contrary to his trial testimony, he had initially told investigators that he and Gaskins had run together to Tyner's cell after the explosion. J.A. at 225. On further cross-examination, Brown admitted that he had revealed nothing to investigators about the speaker-cup bomb, and that when he finally did give his present version of the Tyner murder to the prosecutor, he did so from fear of being charged himself. J.A. at 232. In light of ample opportunities to impeach Brown's credibility, and in light of the overwhelming evidence of Gaskins' guilt, any abuse of the trial court's discretion on this score was harmless beyond a reasonable doubt.

[9] Similarly, any improper restriction on Gaskins' direct examination of John Caison was harmless beyond a reasonable doubt. On direct examination, James Brown stated that he had never admitted to Caison having attempted to poison Tyner. On direct examination of Caison, Gaskins attempted to elicit testimony to the effect that Brown had admitted attempting to poison Tyner and that, on the day of the explosion, Brown had told Caison to stay away from death row. The trial court excluded these statements as inadmissible hearsay. J.A. at 298–301. Even so, during cross-examination, Caison testified that "James Brown told me that they were plotting to get [Tyner]," and that Brown told Caison "not to be on death row on Sunday." J.A. at 336–37. The information allegedly excluded was therefore ultimately adduced during cross-examination, rendering any error by the trial court in excluding it harmless beyond reasonable doubt. *See Grundler*, 283 F.2d at 802.

Gaskins' final challenge to the state trial court's evidentiary rulings involves the court's refusal, after being informed that witness William Cole would assert his fifth amendment privilege against self-incrimination if forced to testify, to require Cole to take the stand and assert the privilege in open court. Out of the jury's hearing, the trial court determined that the crux of Cole's testimony would be that, after the explosion, Gaskins went, not to his cell as Brown had testified, but down to the site of the explosion. *See Gaskins*, 326 S.E.2d at 140.

[10, 11] A criminal defendant's right to compel testimony is fundamental to sixth and fourteenth amendment due process rights. *See United States v. Goodwin*, 625 F.2d 693, 703–04 (5th Cir.1980). When a witness indicates that he will assert the fifth amendment privilege, the trial judge must make a proper and particularized inquiry into the legitimacy and scope of the witness' assertion of the privilege. *See id.* at 701. A witness may be totally excused only if the court finds that he could legitimately refuse to answer any and all relevant questions. *See id.*

[12] On this point we agree with the South Carolina Supreme Court that the trial court's refusal to require Cole to assert his fifth amendment privilege before the jury was in any event harmless error. First off, as the South Carolina Supreme Court concluded, Cole's testimony would have been merely cumulative. *See Gaskins*, 326 S.E.2d at 140. Moreover, the fact that Gaskins did not elect to offer Cole's expected testimony in the state post-conviction proceeding strongly suggests his own estimate of its slight probative value. Any error in refusing to require Cole to take the stand was harmless beyond a reasonable doubt.

VI

Gaskins' next claim involves alleged prosecutorial misconduct.

During the state's closing argument at the guilt phase of Gaskins' trial, the solicitor stated that he wished to talk to the jury "about what is not in dispute in this case." J.A. at 367. The solicitor then proceeded to list fourteen so-called "undisputed" pieces of evidence, eight of which, Gaskins argues, only Gaskins could have disputed. Additionally, during the sentencing phase of Gaskins' trial, the prosecutor stated that "Mr. Gaskins has shown no remorse. No emotion. He has shown you nothing." J.A. at 577. Gaskins did not object to these statements at trial, but argued on both direct appeal and collateral review that these statements constituted violations of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) (improper comment on defendant's failure to testify).

[13, 14] In assessing an alleged *Doyle* violation, the question is whether the disputed statement so infected the trial and sentencing with unfairness that the ultimate conviction and sentence constituted a denial of due process. *See Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The eight "undisputed" pieces of evidence are: (1) tapes of Gaskins' conversations with Jack Martin (the intermediary through whom Cimo contacted Gaskins in prison); (2) identities of the voices on the Martin–Gaskins tapes; (3) the dates when the conversations occurred; (4) the exhibit showing when Cimo and Gaskins conversed; (5) Gaskins' voice on a statement given to an investigator; (6) two inculpatory letters written from Gaskins to Brown; (7) a letter written from Gaskins to Lee exculpating Lee; and (8) that electronic equipment, a soldering iron, speakers, and radios were found in Gaskins' cell.

As the magistrate's recommendation, adopted by the district court, correctly notes, Gaskins presumably could have brought the testimony of voice and handwriting analysts to contradict items 1–7, and any number of inmates could have testified to the items Gaskins kept in his cell before Tyner's murder. We agree with the district court that, under these circumstances, the prosecutor's "laundry list" argument did not constitute a *Doyle* violation.

[15] Likewise, the state's argument during sentencing to the effect that Gaskins has shown no remorse must be viewed in context. The solicitor stated that:

> Mr. Gaskins has announced to the Court that he is going to make a speech to you as well. I want Mr. Gaskins when he comes up to tell you what in his character caused him to murder each of these people, what caused him to murder Dennis Bellamy? What caused him to shoot this 15 year old, Johnny Knight, in the back of the head?
>
> . . . . . .
>
> Mr. Gaskins has shown no remorse. No emotion. He has shown you nothing.
>
> . . . . . .
>
> Mr. [Gaskins] is going to speak to you at this time . . . and I ask you to listen to [him] as you listened to me.

J.A. 576–77. Under no reasonable view can the solicitor's statement be construed to constitute an improper comment on Gaskins' refusal to testify at the guilt phase of his trial.

VII

Gaskins asserts the following two errors in the trial court's guilt-phase jury instructions: (1) the trial court's charge regarding presumed malice constituted an impermissible burden-shifting instruction; and (2) the trial court's reasonable doubt instruction impermissibly lessened the state's burden of proof.

As part of the jury charge, the trial court instructed the jury that "while malice is presumed from the use of a deadly weapon or from a dangerous instrument . . . where circumstances relating and surrounding the incident are brought out, then the presumption vanishes and malice again must be proven to you beyond a reasonable doubt."

J.A. at 442. On direct appeal, the South Carolina Supreme Court held that, although the instruction constituted impermissible burden-shifting, the constitutional error was harmless beyond a reasonable doubt. *See Gaskins*, 326 S.E.2d at 143. Both the magistrate and the district court agreed with the state supreme court. J.A. 1186; 1326–27. We also agree.

[16] Even where an instruction constitutes impermissible burden-shifting, any error in giving it may be found harmless if the reviewing court can say beyond reasonable doubt that the jury would have found it unnecessary to rely on the burden-shifting presumption in order to convict. *See Rose v. Clark*, 478 U.S. 570, 583, 106 S.Ct. 3101, 3109, 92 L.Ed.2d 460 (1986).

[17] Here, the jury necessarily found by its guilty verdict that Gaskins had murdered Tyner with a bomb Gaskins had built from electronic components in his cell and a piece of dynamite he received in the mail, so it is difficult to see how the jury could not have concluded, even without the presumption, that the killing was done "with malice." Aside from the raw circumstances of the killing, transcripts of conversations between Gaskins and Jack Martin (the intermediary who procured Tyner's murder) constitute further overwhelming evidence of malice.[3] We therefore can say " 'beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.' " *Id.*

[18] Gaskins next asserts that the trial court's definition of reasonable doubt for the jury as "a doubt for which you can give a reason[,] [i]t is a substantial doubt," J.A. at 439, relieved the prosecution of proving every element of the crime beyond reasonable doubt as required by *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).

An instruction equating reasonable doubt with " 'a substantial doubt, a real doubt' ... although perhaps not in itself reversible error, often has been criticized as confusing." *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978). At some point, a reasonable doubt definition may be so incomprehensible or potentially prejudicial that it requires reversal. *See United States v. Moss*, 756 F.2d 329, 333 (4th Cir.1985). Nevertheless, the question in a collateral proceeding such as this is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process, not merely whether 'the instruction is undesirable, erroneous or even universally condemned.' " *Smith v. Bordenkircher*, 718 F.2d 1273, 1276 (4th Cir.1983) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977) (citations omitted)).

Viewed in the context of the entire record of trial, the substantial-doubt portion of the instruction did not rise to the level of a due process violation. First, the trial court employed the instruction to set in contrast "some imaginary doubt or some slight doubt or some fanciful doubt that you might have." J.A. at 439. The trial judge's use of the term substantial doubt was, in context of the entire instruction, more accurate than when viewed in artificial isolation, and was not "likely to 'mislead the jury into finding no reasonable doubt when in fact there was some.' " *Smith v. Bordenkircher*, 718 F.2d at 1277. Moreover, the trial court flatly instructed the jury that "the proof offered by the state must exclude every other reasonable hypothesis except the guilt of the accused and must satisfy you beyond a reasonable doubt." J.A. at 444. This instruction further neutralized any negative effects of the substantial-doubt instruction. *See Bordenkircher*, 718 F.2d at 1277.

3. Some examples of conversations appear in the record:

> When he plugs that son of a bitch up, it'll blow him on into hell.... Dam [sic] if I can't fix him up.
>
> Get me enough to do that damn job and listen for the bang.
>
> That's enough [drug] to bust his heart.
>
> The next night after I get [the poison] ... that son of a bitch'll be laid out.
>
> That's a hell of a hard nigger to get rid of.

J.A. 1185.

We are not prepared to say that this instruction, even in combination with the substantial doubt instruction, "so infected the entire trial that the resulting conviction violates due process." *Id.* at 1276.

VIII

[19] Gaskins argues that allowing evidence that a prior death sentence of Gaskins had been vacated could have led the jury to believe that any death penalty it imposed was advisory only, thereby diminishing the jurors' sense of responsibility for death-penalty imposition in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (eighth amendment violation to tell jury that Mississippi Supreme Court would review any death sentence).[4]

"[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328–29, 105 S.Ct. at 2639–40. Nevertheless, "if the challenged instructions accurately described the role of the jury under state law, there is no basis for a *Caldwell* claim. To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989).

The asserted *Caldwell* violation occurred when, during the penalty phase of the trial, the state introduced evidence of Gaskins' previously vacated murder conviction.[5] And it is argued that this *Caldwell* violation was aggravated by the trial court's use over 40 times of words to the effect that "you will *recommend* that the court sentence the defendant to life imprisonment [or] death." J.A. 610 (emphasis added).

Even taken together, we conclude that this evidence and the judge's statement "had no effect on the sentencing decision." *Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646. First, Gaskins points to no references by the state or the trial judge concerning death-sentence review. We do not believe that evidence concerning a prior vacated death sentence "improperly described the role assigned to the jury by local law." *Dugger*, 109 S.Ct. at 1215. The most that a reasonable jury could have made of this evidence was that the statute under which the jury was to sentence Gaskins might conceivably be invalidated as unconstitutional at some future date. Nowhere was there any suggestion that such invalidation was imminent or even contemplated.

[20] Similarly, even taken together with the prior-death-sentence evidence, it is difficult to see how, in context, the trial judge's use of the word "recommend" could have had an effect on the sentencing decision. In an exhaustive analysis, the facts of which are not disputed here, the magistrate noted that during *voir dire*, the trial judge, the solicitor and Gaskins' attorney repeatedly told each juror that the jury could sentence to death or life imprisonment, that the jury had to make the decision, and that "the jury will be asked to decide his punishment, either life imprisonment or death by electrocution." Moreover, in each case Gaskins cites finding a *Caldwell* violation, the suggestion to the jury that its decision was merely advisory was explicit and obvious. Nowhere in this case did anyone even imply that the jury's recommendation was non-binding. Though, in retrospect, we believe a wiser course would have been for the trial judge to explicitly instruct the jury that the word "recommendation" meant "binding recommendation," under the circumstances, we are satisfied that the jury was properly aware of its sentencing responsibilities.

4. Because this claim is closely related to Gaskins' claim that the trial judge's sentencing-phase instructions exacerbated the *Caldwell* violation, both will be dealt with in this section of the opinion.

5. The sentence was vacated when the South Carolina Supreme Court declared South Carolina's death penalty statute unconstitutional.

[21] Gaskins also contends that, even if there was no *Caldwell* violation, allowing testimony concerning the prior-vacated death sentence introduced arbitrary factors in the sentencing decision in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Gaskins argues that this testimony implied that, regardless of whether Gaskins should be sentenced to death for Tyner's murder, the jury could properly reimpose the earlier death penalty which was, after all, only vacated because of a legal technicality. Although we agree that evidence of a prior-vacated death penalty is of limited, if any, relevance to the jury's decision whether to impose the death penalty, it is simply not a consideration so "constitutionally impermissible or totally irrelevant to the sentencing process," *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 2747, 77 L.Ed.2d 235 (1983), as to rise to the level of a violation of *Booth*.

IX

Gaskins' final assignments of error concern the trial judge's instructions to the sentencing jury to the following effect: (1) that the jury could not allow itself to be governed by sympathy; (2) that mitigating circumstances must be found beyond a reasonable doubt; (3) that the decision to impose a life sentence must be unanimous.

[22] At the sentencing hearing, the trial court instructed the jury not to allow itself to be governed by sympathy:

> You cannot allow yourselves to be governed by sympathy, by prejudice, or by passion or by public opinion. Both the state and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in this case....

J.A. at 619. Gaskins argues that this instruction, coupled with the prosecutor's statements to the effect that Gaskins was asking for, but deserved, no mercy, constituted an eighth amendment violation because it effectively precluded the jury from considering relevant mitigating evidence offered by Gaskins, namely his individualized appeal for compassion, understanding and mercy. *See, e.g., Caldwell*, 472 U.S. at 330–31, 105 S.Ct. at 2640–41; *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976).

Our consideration of this issue is foreclosed by the Supreme Court's recent decision in *Saffle v. Parks*, — U.S. —, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990). *Parks*, considering the eighth amendment ramifications of a sympathy instruction in all material respects identical to the charge given in Gaskins' case,[6] held that to uphold such a claim would be to adopt a "new rule" under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), that did not fall within *Teague*'s two exceptions. Accordingly, the proposed rule could not be announced or applied in a habeas case on collateral review. *Parks*, 110 S.Ct. at 1263–64. *Parks* dictates a similar rejection of Gaskins' claim here.

[23] Gaskins next asserts that the following charge, because it used the term "reasonable doubt" so close to the term "mitigating circumstance," impermissibly suggested to the sentencing jury that mitigating circumstances must be found beyond reasonable doubt in contravention of the eighth amendment:

> Before you can recommend the imposition of a life sentence, it is not necessary and I repeat, *it is not necessary for you to find beyond a reasonable doubt the existence of any alleged statutory mitigating circumstances* or any other mitigating circumstance,
>
> While it is necessary for you to find beyond a reasonable doubt the existence of at least one alleged statutory aggravating circumstance before you can recommend that the defendant be sentenced to death, it is not—*it is not required that you find beyond a reasonable doubt the existence of at least one alleged statutory mitigating circumstance in order to recommend that the defendant be given a life sentence.* As a matter of fact, *you may recommend that the defendant receive a life sentence irrespective of whether you find the existence in the evidence of an alleged statutory mitigating circumstance or not; but where you consider an alleged statutory mitigating circumstance, it is proper for you to consider only a statutory mitigating circumstance that is supported by the evidence.*

J.A. 614–15 (emphasis added). We disagree. Gaskins' strained interpretation of the trial court's jury instruction is simply not supported by its language, and does not warrant finding an eighth amendment violation.

[24] Similarly, the trial court's statement to the effect that "you have to find at least one or more aggravating circumstances or else you will have to recommend a death sentence [presumably the trial court meant to say life imprisonment instead of death sentence]," could not, in the context of the entire charge, have confused a reasonable juror. As the South Carolina Supreme Court stated, the trial court instructions made patently clear that: (1) a death penalty could not be imposed without aggravating circumstances; (2) if statutory or non-statutory mitigating circumstances were found, a life sentence would be appropriate; (3) the jury had, in any case, full discretion not to impose the death sentence, even though aggravating circumstances and no mitigating circumstances were found. *See Gaskins*, 326 S.E.2d at 146.

[25] Gaskins' final asserted error in the jury charge concerned the trial court's erroneous instruction to the effect that the decision to impose a life sentence must be unanimous. Gaskins contends that this incorrect instruction effectively communicated to the jury that if all members of the jury did not agree on Gaskins' sentence, then a mistrial would ensue. Thus, the erroneous instruction constituted an arbitrary factor into the sentencing, rendering the unanimous death sentence unreliable. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

We disagree. Although the trial court inadvertently misstated South Carolina law, it is inconceivable that the disputed instruction could have caused the jurors unanimously to impose a death sentence out of fear of mistrial should they not be unanimous in their decision to impose life imprisonment. We are satisfied that this improper instruction, viewed in context of the entire jury charge, could have had no effect on the sentencing decision. *See Caldwell*, 472 U.S. at 341, 105 S.Ct. at 2646.

X

For the foregoing reasons, we affirm the district court's dismissal of Gaskins' habeas corpus petition.

AFFIRMED.

6. The challenged instruction in *Parks* stated that:

> You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duty as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions.

Parks v. Brown, 860 F.2d 1545, 1552 n. 8 (10th Cir.1988), *reversed*, — U.S. —, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

ESTATE OF William L. RENO, Jr.; Barbara G. Reno, Executrix, Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 89-2078.

United States Court of Appeals, Fourth Circuit.

Argued Oct. 30, 1989.

Decided Oct. 19, 1990.

Estate filed petition in tax court seeking redetermination of assessed deficiency. The United States Tax Court, Lawrence A.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 16, 1990

No. 89-4011

DONALD HENRY GASKINS

Petitioner - Appellant

v.

KENNETH D. MCKELLAR, Warden, Central Correctional Institution; ATTORNEY GENERAL OF SOUTH CAROLINA, T. Travis Medlock

Respondents - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Chief Judge Ervin and Judge Chapman.

For the Court,

JOHN M. GREACEN
CLERK